ECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD. AND
JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG,
AND DAVID MULLINS,

Respondents.

On Writ of Certiorari
to the Colorado Court of Appeals

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DONALD B. VERRILLI JR.
GINGER D. ANDERS
CHAD GOLDER
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
donald.verrilli@mto.com

JORDAN D. SEGALL
ALLYSON R. BENNETT
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, California 90071
(213) 683-9208

HILARIE BASS
Counsel of Record
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 606054
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae *the American Bar Association*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

I. THERE IS NO CONSTITUTIONAL EXCEPTION TO PUBLIC ACCOMMODATIONS LAWS FOR COMMERCIAL ENTERPRISES 8

A. This Court Has Long Recognized States' Authority to Pass Public Accommodations Laws 9

B. Congress Rejected a Commercial Constitutional Exception When It Enacted the Civil Rights Act of 1964 10

C. This Court Rejected Constitutional Challenges to Title II Seeking Commercial Constitutional Exceptions 17

II. PETITIONERS' CLAIMED COMPELLED-SPEECH EXEMPTION WOULD VITIATE PUBLIC ACCOMMODATIONS LAWS 22

A. This Court Has Recognized That Applying Public Accommodations Laws To Commercial

Establishments Raises No First Amendment Concerns 22

B. Because Virtually Any Business Activity Can Be Recast As Expressive In Nature, Petitioners' Claimed Exemption Would Eviscerate Antidiscrimination Laws 26

C. The Assertion That An Exemption From Public Accommodations Laws Can Be Limited To Opposition To Gays And Lesbians And Marriage Equality Is Meritless 30

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Bob Jones University v. United States,
461 U.S. 574 (1983) 21, 29, 34

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 7, 22, 23, 24, 25, 28

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) 30

Employment Division v. Smith,
494 U.S. 872 (1990) 29, 30

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 5, 17, 18, 19, 34

Hishon v. King & Spalding,
467 U.S. 69 (1984) 1

Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 7, 22, 23, 24, 25, 28

Katzenbach v. McClung,
379 U.S. 294 (1964) 6, 18, 19

Lawrence v. Texas,
539 U.S. 558 (2003) 2, 3, 21, 34

Loving v. Virginia,
388 U.S. 1 (1967) 32, 33, 34

Newman v. Piggie Park Enterprises,
390 U.S. 400 (1968) 6, 19, 20

Newman v. Piggie Park Enterprises, Inc.,
256 F. Supp. 941 (D.S.C. 1966) 20

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 3, 8, 15, 32, 33, 34

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 23

Railway Mail Association v. Corsi,
326 U.S. 88 (1945) 9, 10

Romer v. Evans,
517 U.S. 620 (1996) 3, 8, 31, 32

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) 23, 25, 29

United States v. Windsor,
133 S. Ct. 2675 (2013) 3, 34

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 18, 19

STATUTES

Civil Rights Act of 1964, Pub. L. No. 88-352,
78 Stat. 241 (1964) ..... *passim*

Religious Freedom Restoration Act of 1993,
42 U.S.C. § 2000bb 30

LEGISLATIVE MATERIALS

110 Cong. Rec.:

p. 2765 (1964) 12

p. 7778 (1964) 12

p. 8444 (1964) 5, 11

H.R. Rep. No. 88-914 (1963) 16

Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Committee on the Judiciary, 92nd Cong. (1971) 16

S. Rep. No. 88-872 (1964) 5, 11, 16

COURT MATERIALS

Brief for Petitioner, *Bob Jones University v. United States*, 461 U.S. 574 (1983), 1981 U.S. S. Ct. Briefs LEXIS 1345 21

Jurisdictional Statement and Brief of Appellant, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), 1964 WL 81380 17

Brief for Appellees, *Katzenbach v. McClung*, 379 U.S. 294 (1964), 1964 WL 81100 ..... 6, 18, 19

Petitioner's Appendix, *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) 20

Brief for Appellant, *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945), 1945 WL 48802 ..... 9, 10

OTHER MATERIALS

ABA House of Delegates, https://www.americanbar.org/groups/leadership/house_of_delegates.html 2

Robert H. Bork, *Civil Rights—A Challenge*, The New Republic, Aug. 31, 1963, at 21 13

Sam J. Ervin, Jr., *The United States Congress and Civil Rights Legislation*, 42 N.C. L. Rev. 3 (1963) 11

Maura Judkis, *A Gay Couple Was Told that their Sharing Dessert "Doesn't Go With the Ambiance' at a D.C. Restaurant*, Wash. Post, Aug. 21, 2017, http://wapo.st/2ySarwy 26

Pew Research Center, *Intermarriage in the 50 Years Since* Loving v. Virginia, *Public Views On Intermarriage* (2017), http://pewrsr.ch/2vzeVt5 ..... 33, 34

Christopher W. Schmidt, "Defending the Right to Discriminate, The Libertarian Challenge to the Civil Rights Movement," *in Signposts: New Directions in Southern Legal History* 417 (Sally E. Hadden and Patricia Hagler Minter, eds., 2013) 5, 13

Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283 (1996) 21

Text of Goldwater Speech on Rights, N.Y. Times, June 19, 1964, at 18 13

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") as *amicus curiae* respectfully submits this brief in support of respondents. As the country's leading association of legal professionals, the ABA is acutely aware that lawyers historically argued that their "constitutional rights of expression and association" provided legal shelter from antidiscrimination laws. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quotation marks omitted). But this Court has long held that such claims are *not* entitled to "affirmative constitutional protection" *Id.* The ABA urges this Court to reject petitioners' equivalent arguments and hold that Colorado may constitutionally apply its public accommodations law to bar commercial enterprises from refusing to sell wedding cakes to same-sex couples.

The ABA is one of the largest voluntary professional membership organizations in the United States. Its membership comprises more than 400,000 attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

judges,[2] legislators, law professors, law students, and non-lawyers in related fields.

The ABA's mission is to serve the legal profession and the public "by defending liberty and delivering justice." Consistent with that mission, the ABA has long advocated against discrimination based on sexual orientation. For example, in 1973, two decades before this Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the ABA adopted a policy urging the repeal of laws criminalizing private sexual relations between consenting adults.[3]

The ABA also has worked to eliminate discrimination against gay and lesbian people who are, or who wish to become, lawyers. In 1992, the ABA amended its constitution to make the National Lesbian and Gay Law Association an affiliated organization with a vote in the HOD. In 1994, the ABA incorporated into its standards of Approval of Law Schools a requirement that accredited law schools not discriminate on the basis of sexual orientation. In 2002, the ABA amended its constitution to prohibit state and local bar associations that discriminate on the basis of sexual orientation from being represented in the HOD.

---

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any members of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Counsel prior to filing.

[3] Only recommendations that are presented to and adopted by the ABA's House of Delegates ("HOD") become ABA policy. *See* ABA House of Delegates, https://www.americanbar.org/groups/leadership/house_of_delegates.html.

Of special relevance here, the ABA in 1989 adopted a policy advocating against discrimination based on sexual orientation in employment, housing, and public accommodations; in 2006, adopted a similar resolution with respect to discrimination based on actual or perceived gender identity; and in 2010, adopted a policy urging the elimination of all legal barriers to civil marriage between two persons of the same sex.

The ABA has filed *amicus* briefs in several cases in which this Court has considered the equal dignity of gay and lesbian people, including *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In landmark decisions beginning with *Romer* and continuing through *Obergefell*, this Court has recognized that gay and lesbian people are entitled to "equal dignity in the eyes of the law." *Obergefell*, 136 S. Ct. at 2608. Equal dignity necessarily encompasses a right to participate on full and equal terms in day-to-day commercial and social activities without fearing exclusion and stigma based on one's identity or intimate relationships. For centuries, public accommodations laws have protected the right of persons to obtain goods and services on equal terms. And since the Civil Rights Era, Congress and this Court have considered arguments by commercial entities claiming constitutional exemptions from laws forbidding race discrimination in the provision of public accommodations. By decisively

rejecting those arguments, Congress and this Court ensured that basic protections against race discrimination, though controversial when first enacted, matured into enduring norms that command broad acceptance and mark our progress as a Nation.

In this case, the Court faces a choice very much like the choice it faced when Congress passed the Civil Rights Act in 1964. The Court has only recently recognized that the Constitution protects the equal dignity of gay and lesbian people. And this constitutional protection remains the subject of good faith disagreement. Petitioner Phillips contends that Colorado's public accommodations law unconstitutionally forces him to endorse marriage equality for gay and lesbian people in contravention of his beliefs, just as business owners challenged the 1964 Act as an infringement on their constitutional liberty to decide whether to endorse racial equality. To ensure that the rights of gay and lesbian people can be fully and publicly realized in communities across the country, it is imperative that this Court reject petitioners' request for a constitutional exemption to public accommodations laws, just as it did a half-century ago when business owners sought similar exemptions from laws prohibiting race discrimination.

I. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964)—Title II of which prohibited discrimination on the basis of race, religion, and national origin in public accommodations in interstate commerce—was a watershed. With a half-century's distance, it is easy to forget that the principle of racial equality was far from securely established by 1964. The campaign of "massive resistance" against integration of schools and other public facilities had not yet

run its course. Only one year earlier, Medgar Evers had been murdered for his civil-rights organizing efforts in Mississippi, and Dr. King had authored his Letter from a Birmingham Jail and spoken from the Lincoln Memorial during the March on Washington. And the brutal assaults on protesters at the Edmund Pettus Bridge were still a year in the future.

That was the backdrop against which Congress debated the Civil Rights Act. And while antidiscrimination principles in general received wide endorsement in Congress, the debates featured passionate arguments that those principles should be subordinated to the right of business owners to discriminate based on their personal beliefs about customers. Senator J. Lister Hill of Alabama, for example, argued that Title II violated individuals' "fundamental right[]" to choose his associates, and that "forced association is not free." 110 Cong. Rec. 8444 (1964). Senator Barry Goldwater offered similar constitutional arguments to explain his opposition to the law. *See* Christopher W. Schmidt, "Defending the Right to Discriminate, The Libertarian Challenge to the Civil Rights Movement," *in Signposts: New Directions in Southern Legal History* 417, 433 (Sally E. Hadden & Patricia Hagler Minter, eds., 2013). Ultimately, those arguments did not win the day. Congressional committees endorsed the view that "[t]here is no serious question of the right of association or of property or of privacy as a barrier to the legislation," *see* S. Rep. No. 88-872, at 92 (1964), and Congress passed the statute.

After the Civil Rights Act became law, commercial enterprises pressed the same arguments in the courts, again without success. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), for example, this

Court rejected the contention that the Civil Rights Act violated a business's Fifth and Thirteenth Amendment rights by denying the personal liberty to select customers. The Court reaffirmed that holding in *Katzenbach v. McClung*, 379 U.S. 294 (1964), ruling that the Act did not violate due process by interfering with a restaurant owner's rights to refuse to serve whomever he pleased. And in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), the Court rejected as "patently frivolous" a business owner's contention that serving African Americans violated his free-exercise rights.

In each case, the business owners framed their arguments in terms strikingly similar to the arguments now before the Court. In *Katzenbach*, for instance, the restaurant owner asserted that "the personal rights of persons in their personal convictions and in their choice of associates have been recognized and accorded constitutional protection by this Court." Brief for Appellees, *Katzenbach v. McClung*, 379 U.S. 294 (1964), 1964 WL 81100, at *33 ("*McClung* Br."). Petitioners frame their claimed exemption in terms of compelled speech rather than association, but the thrust is the same: petitioners seek the right to choose, based on their religious and moral convictions, which of their customers will receive a full range of services and which will be relegated to a demeaning second-class status.

II. This Court should reject petitioners' claim for a First Amendment exemption from Colorado's accommodations law because such an exemption would undermine the antidiscrimination principles that Congress and the courts have determined are fundamental to our pluralistic society.

Petitioners (joined by the federal government) claim to find support for their proposed exemption in *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Those decisions recognized a narrow exception to the general principle that laws regulating conduct for reasons unrelated to expression should receive minimal First Amendment scrutiny. Specifically, the Court held in both cases that public accommodations laws may not be applied to an expressive association whose purpose is to communicate its members' messages, when doing so would force the association to alter those messages. But at the same time, the Court emphasized that applying public accommodations laws to commercial establishments—like petitioners'—raises no First Amendment concern. Unlike expressive associations, commercial establishments historically have been understood to exist for commercial purposes and to be obligated to accept all comers. Any speech in which they engage is treated as incidental to their commercial purposes—not as endorsement of views or beliefs of the customers they serve, or even of the principle that those customers are entitled to service on equal terms. Accordingly, those decisions provide no support for the exemption that petitioners and the government advocate here.

That is for good reason. Recognizing petitioners' claim to a compelled-speech exemption to public accommodations laws would convert the narrow departure recognized in *Hurley* and *Dale* into a gaping hole that would permit virtually any business to assert a First Amendment right to treat any group of persons as second-class citizens unworthy of full participation in the life of the community. Many business activi-

ties—from serving meals to seating patrons to providing legal advice and counseling—can be recast as expressive in nature. Permitting compelled-speech claims to override public accommodations laws therefore would vitiate those laws, leaving individuals vulnerable to the stigma of being refused service based on business owners' beliefs and hobbling government's authority to enforce a basic guarantee of equal dignity.

Cognizant of the risk that their arguments present to sound and principled enforcement of federal, state, and local antidiscrimination laws, petitioners and the government suggest that any First Amendment speech exemption could be narrowly cabined to protect only opposition to gays and lesbians and marriage equality—as opposed to racial discrimination generally or opposition to interracial marriage in particular. That suggestion flies in the face of *Romer* and *Obergefell*. Accepting it would drain much of the substance from the Constitution's guarantee of "equal dignity in the eyes of the law." *Obergefell*, 136 S. Ct. at 2608. This Court should reject the invitation to single out gay and lesbian people for disfavored treatment under public accommodations laws.

I. THERE IS NO CONSTITUTIONAL EXCEPTION TO PUBLIC ACCOMMODATIONS LAWS FOR COMMERCIAL ENTERPRISES

As long as there have been public accommodations laws, there have been challenges to those laws based on businesses' asserted constitutional right to choose their customers. Each time, as here, the business owner asserted a sincere moral or religious objection to serving a particular class of customers. The basis for those constitutional challenges varied over time—

ranging from arguments based on the Fourteenth Amendment, to arguments based on the Fifth and Thirteenth Amendments, to arguments based on the First Amendment rights of free association, free exercise of religion, and free speech. But this Court's response never deviated. So long as the business chose to place its goods and services in the stream of commerce, this Court has been crystal clear that there is no commercial constitutional exception to public accommodations laws. Petitioners dress their First Amendment arguments in new constitutional garb, but the substance of those arguments is equally threadbare.

A. This Court Has Long Recognized States' Authority to Pass Public Accommodations Laws

1. When this Court was called upon to rule on the constitutionality of a state public-accommodations law more than seventy years ago, it unequivocally rejected arguments akin to those made by petitioners here. In *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945), a union challenged a state law forbidding labor organizations from denying membership or equal treatment of members on the basis of race, color or creed. Like petitioners, the union argued that the law violated its constitutional right to discriminate. It insisted that "[t]here will always be discriminations. We discriminate in the methods of our religious worship.... We differ in our tastes and likes, and yet nothing can be done about this for it is beyond regulation in the absence of a binding grant from us to our form of government." Brief for Appellant, *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945), 1945 WL 48802, at *30. Emphasizing its so-called "social" rights, the union

argued that it would be unconstitutional to "deprive the [Association] or its members of the right to make selection in choosing members." *Id.*

Although the union located its asserted constitutional right in the Due Process Clause, and although it believed it had the right to discriminate on the basis of race, rather than sexual orientation, the crux of its contentions were exactly the same as petitioners'. Like petitioners, the union argued that it was exercising "a personal and constitutional right beyond the power of legislation." But the Court rejected that argument, holding that there was "*no constitutional basis* for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed." *Corsi*, 326 U.S. at 94 (emphasis added).

B. Congress Rejected a Commercial Constitutional Exception When It Enacted the Civil Rights Act of 1964

Two decades later, this Court was again asked to endorse a commercial constitutional exception to a public accommodations law. This time, it was in the context of the Civil Rights Act of 1964. Before judicial challenges to the Act were filed, however, businesses and their supporters began voicing those constitutional objections when the Act was debated in Congress. Those arguments failed to stop the enactment of the Act's public accommodations provision, just as they would later fail to persuade this Court.

1. Congressional opponents of the Civil Rights Act repeatedly contended that business owners should be free to discriminate based on their personal views about potential customers, and that a federal public accommodations law would encroach on that freedom.

Senator Sam Ervin, Jr. wrote a law review article in which he argued that "there is all too little discussion of the immense price in personal liberty and freedom that will be the cost" of public-accommodations legislation. Sam J. Ervin, Jr., *The United States Congress and Civil Rights Legislation*, 42 N.C. L. Rev. 3, 10 (1963). Senator J. Lister Hill argued that Title II of the Act destroyed freedom by compelling individual association: "Just as freedom of thought and belief are fundamental rights reserved to an individual, so is freedom to choose one's associates, and, conversely, freedom from compulsion to associate, for forced association is not free." 110 Cong. Rec. 8444 (1964). Senator John L. McLellan argued that Title II's requirements "would deny American citizens the freedom of choice—the freedom to select their own personal associates and business customers." *Id.* at 7871. And Senator Strom Thurmond submitted a lengthy statement contending that Title II was "an unconstitutional and unwarranted invasion of an individual's right to hold, enjoy, and utilize private property." *See* S. Rep. No. 88-872, at 42 (1964). "[I]ndividual liberty," Thurmond explained, "means that a private property owner has the liberty of choosing, according to his own even arbitrary, capricious, or irrational desires, the persons with whom he desires to deal." *Id.* at 65.

Much like petitioners, opponents of the Act also framed the issue as a "choice between surrendering constitutional rights and bankruptcy":

> There are those who argue that liberty and freedom and choice are not impinged upon by H.R. 7152. They assert that if a person who owns a place of public accommodation does not wish to submit to the compulsion of a law which dictates whom he

> must serve, he can simply discontinue doing business. This argument, which seems to be based on a freedom of choice between surrendering constitutional rights and bankruptcy, ignores several fundamental principles. In reality, the property owner is given no choice, except a choice between the rock and the whirlpool.

Id. at 4829 (statement of Sen. Stennis); *cf.* Pet. Br. at 2 (Colorado's public accommodations law "effectively forc[ed Petitioner] to stop designing wedding cakes" and cost him 40% of his business).

Some legislators made free expression arguments much like those that petitioners propound. Senator John Tower argued that the Act "would attempt to deny to millions of employers and employees any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people." 110 Cong. Rec. 7778 (1964). And Congressman Charles Edward Bennett contended that it "not only violates our Constitution but it strikes a serious blow against the treasured ideal of liberty.... We allow people to refuse to salute our American flag.... Much of this tolerance is based upon misconstruction of our doctrine of religious freedom... In a country which tolerates all sorts of peculiar behavior based upon religious convictions, is it not possible that those same concepts of religious toleration should allow people to teach their children to love all people of all races but discourage close associations that may lead to intermarriage with members of other races?" 110 Cong. Rec. 2765 (1964).

As the congressional debate drew to a close, Senator Barry Goldwater offered the most prominent liberty-based argument against the Act. He stated that he had "constantly and consistently voiced objections" to Title II of the Act, which covered "private enterprise in the area of so-called 'public accommodations.'" *Text of Goldwater Speech on Rights*, N.Y. Times, June 19, 1964, at 18. Those "constitutional" objections, he announced, are of such "overriding significance that they are determinative of my vote on the entire measure," even though he was "unalterably opposed to discrimination or segregation on the basis of race, color, or creed, or any other basis." *Id.* Senator Goldwater concluded that Title II's regulation of private enterprise would "fly in the face ... of our God-given liberties" and "could ultimately destroy the freedom of all American citizens, including the freedoms of the very persons whose feelings and whose liberties are the major subject of this legislation." *Id.* He emphasized that it was "time to attend to the liberties of all," and not what he called "the special appeals for special welfare." *Id.*

2. In formulating his opposition to the legislation, Senator Goldwater consulted with Robert Bork and William Rehnquist. *See* Schmidt, *supra*, at 433. Both had asserted that public accommodations laws infringed on the constitutional rights of business owners. For example, Professor Bork argued in the *New Republic* that the "justifiable abhorrence of racial discrimination" would, if channeled into public accommodations laws, "be subversive of free institutions." Robert H. Bork, *Civil Rights—A Challenge*, The New Republic, Aug. 31, 1963, at 21. In particular, Professor Bork opposed the Interstate Public Accommodations Act—a

precursor to Title II of the Civil Rights Act—on the ground that it would derogate liberty:

> Few proponents of legislation such as the Interstate Public Accommodations Act seem willing to discuss either the cost in freedom which must accompany it or why this particular departure from freedom of the individual to choose with whom he will deal is justified .... There seems to be a strong disposition on the part of proponents of the legislation simply to ignore the fact that it means a loss in a vital area of personal liberty. That it does is apparent. The legislature would inform a substantial body of the citizenry that in order to continue to carry on the trades in which they are established they must deal with and serve persons with whom they do not wish to associate.

Id. at 22. On this view, it was irrelevant whether "choos[ing] associates on the basis of racial characteristics" was morally defensible. When a majority "impose[s] upon a minority its scale of preferences," Professor Bork argued, "[t]he fact that the coerced scale of preferences is said to be rooted in a moral order does not alter the impact upon freedom," a value of "very high priority." *Id.*

Nor did it matter that the Interstate Public Accommodations Act was drafted to reach businesses—not private clubs, churches, or homes:

> Under any system which allows the individual to determine his own values that distinction [i.e., between personal and business relationships] is unsound. It is, moreover, patently fallacious as a description of reality. The very bitterness of the resistance to the demand for enforced integration

> arises because owners of many places of business do in fact care a great deal about whom they serve. The real meaning of the distinction is simply that some people do not think others ought to care that much about that particular aspect of their freedom.

Id. at 23.

Professor Bork's "description of reality" mirrors that of petitioners here. Like the business owners he described, petitioners also "care a great deal about whom they serve." *Id.* Although petitioners will offer custom cakes to some customers who are about "to find a life that could not be found alone," they will not serve those hoping to "find that liberty by marrying someone of the same sex." *Obergefell*, 135 S. Ct. at 2593. Echoing decades-old arguments, petitioner Phillips insists that the "Commission must respect [his] freedom to part ways with the current majority view on marriage and to create his wedding cakes consistently with his decent and honorable religious beliefs." Pet. Br. at 3 (quotation marks omitted). Petitioner's business decision is grounded in his faith, and there is no doubt that he holds a genuine conviction that "weddings are sacred and that they create an inherently religious relationship." *Id.* at 9. But the only question in this case is whether those personal convictions permit a business owner who serves the public to refuse to provide goods and services to those who "conflict[] with his religious beliefs" when doing so would violate a valid public accommodations law. *Id.*

Future-Justice Rehnquist offered similar arguments when he opposed a Phoenix public accommodations ordinance on the ground that it would intrude on the freedoms of "thousands of small business proprietors."

See Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Committee on the Judiciary, 92nd Cong. 305 (1971) ("Rehnquist Hearings"). He argued to the Phoenix City Council in 1964 that "[h]ere you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not ...." *Id.* After the Council passed the ordinance, he continued to press the argument, maintaining that the ordinance "summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers." *Id.* at 306. In his view, it was "impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as" integration in public accommodations. *Id.* at 307.

3. These arguments did not prevail in Congress. The Senate Commerce Committee's report on the Civil Rights Act of 1964 appended a brief by Professor Paul Freund, which concluded that "[t]here is no serious question of the right of association or of property or of privacy as a barrier to the legislation, applicable as it is to commercial places of public accommodation." *See* S. Rep. No. 88-872, at 92 (1964). The Commerce Committee's report concurred with Freund's analysis, observing that "the right of the private property owner to serve or sell to whom he pleased" had never existed at English common law. *Id.* at 22. The House Judiciary Committee's report on the bill similarly rejected the argument that "the enactment of title II invades rights of privacy and of free association" because "the types of establishments involved in title II are those regularly held open to the public in general." H.R. Rep. No. 88-914, at 9 (1963). The House Report accurately predict-

ed that "there is no question that the courts will uphold the principle that the right to be free from racial discrimination outweighs the interest to associate freely where those making the claim of free association have knowingly and for profit opened their doors to the public." *Id.*

C. This Court Rejected Constitutional Challenges to Title II Seeking Commercial Constitutional Exceptions

President Johnson signed the Civil Rights Act on July 2, 1964. Business owners immediately went to court, again seeking a commercial constitutional exception to public accommodations laws. Those liberty-based objections failed to persuade this Court, just as they had failed to persuade the 88th Congress at that pivotal moment in our history.

1. In *Heart of Atlanta*, 379 U.S. at 241, the plaintiff argued that the Act violated the Constitution by "tak[ing] away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers." Jurisdictional Statement and Brief of Appellant, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), 1964 WL 81380, at *32. Similar to petitioners, the motel argued that "[t]his right of ownership to use one's property as one sees fit is a fundamental principle underlying the private enterprise system." *Id.* at *51. Speaking in precisely the same terms as Petitioner, the motel insisted that "[t]o deprive a person of [his] basic right to pursue his calling ... unless he furnishes labor or services for certain individuals for whom he does not desire to work is obviously coercion if not outright

punishment," in violation of the Constitution. *Id.* at *57; *see* Pet. Br. at 2.

The Court disagreed, explaining that the motel had "no 'right' to select its guests as it [saw] fit, free from governmental regulation." *Heart of Atlanta*, 379 U.S. at 259. The Court rebuffed the motel's appeal for a commercial constitutional exception from public accommodations law in the plainest of terms: "a long line of cases ... rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty." *Id.* at 260.

2. In the next four years, the Court twice reaffirmed that holding. In *Katzenbach*, 379 U.S. at 294, it rejected a restaurant owner's argument that Title II unconstitutionally "deprive[d] the restaurant owners of liberty and property without due process of law in contravention of the guarantees of the Fifth Amendment" by interfering with his "right to use and control his property as he wishes" and to "deal or refuse to deal with whomever he pleases." *McClung* Br. at *31–32. *Katzenbach* involved a restaurant called Ollie's Barbecue that specialized in "barbecued meats and homemade pies." 379 U.S. at 296. In that case, much like this one, the barbecue owner contended that "[e]ven in a highly commercial context, a businessman has always possessed the right to deal with those he pleases, and for reasons personal to himself this right to exclude certain persons might and often does have real meaning to him." *McClung* Br. at *33. The owner further insisted that the "personal rights of persons in their personal convictions and in their choice of associates have been recognized and accorded constitutional protection by this Court." *Id.* In fact, in making this argument, the owner cited the *same compelled-speech case* that peti-

tioners repeatedly cite in their brief. *Compare id.* at *33 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *with* Pet. Br. at 3, 15, 29, 35, 46. Given this authority, the restaurant owner insisted, "it seems plain that Title II imposes upon restaurants within its coverage restraints on established rights of liberty and property which are entitled to constitutional protection." *McClung* Br. at *33.

Petitioner makes strikingly similar arguments, beyond simply citing the same precedent. He contends that he has a First Amendment right to refuse to sell wedding cakes "in conflict with his religious beliefs," Pet. Br. at 1, which, like the owner in *Katzenbach*, have "real meaning to him." *McClung* Br. at *31–32. *Amicus* appreciates that those beliefs have profound importance to petitioner Phillips, and they are no doubt at least as strongly held as the "personal convictions" held by the owner of Ollie's Barbecue. Id. at *33. But, as in *Katzenbach*, those deeply-felt beliefs can find no shelter in the Constitution once a business owner chooses to enter the marketplace. For that reason, the Court rejected the restaurant owner's arguments in a footnote, holding that *Heart of Atlanta* "disposes of the challenges that the appellees base on the Fifth, Ninth, Tenth, and Thirteenth Amendments, and on the Civil Rights Cases." *Katzenbach*, 379 U.S. at 298 n.1.

3. To the extent any doubt remained following these decisions, the Court interred the idea of a commercial constitutional exception to public accommodations laws in *Piggie Park*, 390 U.S. 400. In that case, another restaurant owner sought to defend himself from a lawsuit under Title II by arguing that it interfered with his First Amendment rights. The defendant maintained that he "believe[d] as a matter of religious

faith that racial intermixing or any contribution thereto contravenes the will of God," and so any application of the Act to his business violated his religious liberties. Second Am. Answer, Pet. App. 21a; *see also* Pet. App. 125a–127a (defendant explaining that his religion required segregation).

The district court rejected the defendant's First Amendment claim:

> Undoubtedly defendant Bessinger has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966). And when that claim reached this Court, it provoked a similar reaction: as in *Katzenbach*, the Court needed only a footnote to dispense with the restaurant owner's claim as "patently frivolous." *Piggie Park*, 390 U.S. at 402, n.5.

By the time the Court decided *Piggie Park* in 1968, it was well-established that commercial enterprises could not invoke sincerely held religious or moral beliefs to exempt themselves from public accommodations laws. In fact, the leading intellectual proponents of a commercial constitutional exception to public accommodations laws reversed their thinking. *See* Rehnquist Hearings, *supra*, at 70 (explaining that "I

would not feel the same way today about [the Phoenix ordinance] as I did then"); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 80–81 (1990) (stating that his initial view with respect to Title II "was incorrect because, as I subsequently realized, there are no general principles to decide competing claims of association and nonassociation"). And when *Bob Jones University v. United States*, 461 U.S. 574, 602, 604 (1983), reached this Court, Justice Rehnquist made clear that he would have rejected a university's First Amendment claim based on its "fundamentalist conviction ... that the Scriptures forbid interracial dating and marriage." Brief for Petitioner, 1981 U.S. S. Ct. Briefs LEXIS 1345, at *41. Despite writing in dissent, Justice Rehnquist stated that Congress has the power to deny tax-exempt "status to organizations that practice racial discrimination," and that he agreed "with the Court such a requirement would not infringe on petitioners' First Amendment rights." 461 U.S. at 622 & n.4.

As this history confirms, "times can blind us to certain truths." *Lawrence*, 539 U.S. at 579. In the years after the enactment of the Civil Rights Act and this Court's historic decisions, a "settled social consensus" eventually emerged that business owners who offer their goods and services to the public cannot claim constitutional sanctuary from public accommodations laws. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1291 (1996). Petitioners' effort to breathe new life into such constitutional arguments by recasting them as compelled-speech claims cannot be squared with this Court's unbroken line of precedent refusing to recognize a business owner's individual

right to avoid complying with a valid public accommodations law.

II. PETITIONERS' CLAIMED COMPELLED-SPEECH EXEMPTION WOULD VITIATE PUBLIC ACCOMMODATIONS LAWS

Petitioners and the federal government ask this Court to disregard the hard-earned lessons of our history, and to hold for the first time that the Constitution requires a compelled-speech exemption to public accommodations laws. Recognizing such an exemption would invite myriad challenges to the enforcement of public accommodations laws, as much business activity can be characterized as expressive. More broadly, there would be no principled way to recognize only compelled-speech exemptions while rejecting claims for exemptions based on the free exercise of religion or the freedom of association. The argument pressed by petitioners and the government in this case thus threatens to cripple the effectiveness of the federal public accommodations laws that the Department of Justice is charged with enforcing, as well as comparable state and local laws.

A. This Court Has Recognized That Applying Public Accommodations Laws To Commercial Establishments Raises No First Amendment Concerns

Petitioners and the government attempt to locate their claimed First Amendment right in this Court's decisions in *Hurley*, 515 U.S. 557, and *Dale*, 530 U.S. 640. But those decisions are inapplicable here. The normal rule is that laws that regulate conduct irrespective of whether the conduct may have an expressive element—like public accommodations laws—are

subject at most to deferential First Amendment review. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"). *Hurley* and *Dale* recognized a narrow exception to that rule, holding that a public accommodations law may not be applied to an expressive association whose purpose is to communicate its members' messages, when doing so would force the association to alter its messages. But in those very decisions, the Court emphasized that applying public accommodations laws to commercial establishments—like petitioners'—raises no First Amendment concern.

This case is governed by the rule, not its exception. Extending the exception to cover this case would have profoundly destabilizing consequences.

1. In *Hurley*, the Court held that requiring the organizers of the private parade to permit a pro-gay-rights group to march in the parade unconstitutionally compelled the organizers to change their message. 515 U.S. at 576. Emphasizing the "inherent expressiveness of marching to make a point," the Court concluded that the parade itself is "a form of expression" in which the organizers chose the messages to communicate. *Id.* at 568. The Court was careful to note that public accommodations laws "do not, as a general matter, violate the First ... Amendment[]" because they focus on "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the prescribed grounds," rather than on the content of speech. *Id.* at 572. In the case of the parade, however, the State had attempted to apply its public accommodations law to "the sponsors' speech itself," by requiring the organizers to accommodate participants

whose messages they did not condone. *Id.* at 573. Doing so effectively compelled the organizers to alter the overall message of the parade.

Similarly, in *Dale*, the Court held that applying a public accommodations law to compel the Boy Scouts to permit a gay man to be an assistant scoutmaster violated the Scouts' right of expressive association. 530 U.S. at 660. The Court emphasized that the Boy Scouts' purpose was to "transmit ... a system of values" to young people—in other words, to engage in expression—and that the Boy Scouts transmitted those values through scout leaders. *Id.* at 650. Again, the Court observed that applying public accommodations laws to "clearly commercial entities, such as restaurants, bars, and hotels," gave rise to relatively little "potential for conflict" between those laws and First Amendment rights. *Id.* at 657. Applying the public accommodations law to the Boy Scouts, however, expanded that law well beyond its traditional commercial focus to "places that often may not carry with them open invitations to the public" and, in the case of the Boy Scouts, private "membership organizations" that exist for expressive purposes. *Id.* at 657, *see also id.* at 659 n.4 (suggesting that the Boy Scouts are not a public accommodation at all). That application, the Court concluded, was unconstitutional: because the Boy Scouts' values included a belief that homosexuality was immoral, requiring them to include a gay scout leader would necessarily force them to alter their message. *Id.* at 649–51.

2. In *Dale* and *Hurley*, then, the Court viewed the expressive associations at issue as different in kind from businesses that have been the traditional subject of public accommodations laws. *Dale*, 530 U.S. at 657; *Hurley*, 515 U.S. at 572–73. Those businesses have

long been subject to public accommodations laws, and such laws have always had an incidental effect on speech. *FAIR*, 547 U.S. at 62 (antidiscrimination statutes require businesses to take down "white applicants only" signs). But applying public accommodations laws to those traditional businesses was, in the Court's view, unlikely to raise First Amendment issues. *Dale*, 530 U.S. at 657.

That conclusion follows from the historical consensus (originating at common law, and adopted by Congress, the States, and the courts) that when a business offers goods or services for commercial purposes, it assumes an obligation to be generally open to the public. While expressive associations exist to communicate a message, and therefore must make decisions about the content of that message and the nature of their members, the law has historically held that commercial establishments *must* be open to the public because they exist for commercial purposes, and any speech they engage in is incidental to those purposes. As a result, commercial establishments have never had discretion under the law to make expressive decisions about whom to exclude.

That understanding is imperative in a pluralistic society. To permit entities whose activities are not inherently expressive to challenge generally applicable laws based on "incidental" effects on speech would be to enable them to "erect a shield against laws requiring access simply by asserting that mere association would impair [their] message." *FAIR*, 547 U.S. at 69–70. As discussed below, permitting commercial establishments to claim First Amendment exemptions to antidiscrimination laws would render it more difficult to enforce those laws to ensure that members of disfa-

vored groups are able to participate as full members of American society.

B. Because Virtually Any Business Activity Can Be Recast As Expressive In Nature, Petitioners' Claimed Exemption Would Eviscerate Antidiscrimination Laws

1. Petitioners attempt to avoid the sweeping consequences of the First Amendment exemption they seek by asserting that their cakes are uniquely expressive. In petitioners' view, the expressive content of the cakes means that the act of designing and baking them expresses a message of support for the marriage in question. Pet. Br. at 24. But many, perhaps most, businesses could make similar claims. Consider the following:

- Recently, a restaurant in Washington, D.C., refused to provide a single dessert to a gay couple because two men sharing a dessert would not "go with the ambiance of the restaurant."[4] The restaurant clearly believed that allowing the couple to share dessert communicated that such conduct was acceptable. In serving the dessert on two plates, the restaurant sent an unmistakable message of disapprobation.
- A restaurant could claim that being compelled to admit African-American customers, take their orders, explain the menu, and convey prices entails compelled expression. Even permitting blacks and whites to commingle could be said to communicate that the customers are equal members of the community and that integration is appropriate.

---

[4] http://wapo.st/2ySarwy.

- Fertility clinics could contend that advising same-sex couples on their medical options for having children and providing appropriate treatment, entails compelled speech. Like petitioners' custom wedding cakes, clinic staff must tailor their advice to specific patients. They could claim that providing their services to same-sex or interracial couples conveys the message that it is appropriate for such couples to raise children.
- A clothing store that provides personal shoppers who give personalized advice may claim that it should not be compelled to serve customers shopping for outfits for a wedding of same-sex couples because doing so sends a message of endorsement.

As these examples show, no principled distinction can be drawn between petitioner's custom wedding cakes and a wide array of business activities that could be cast as expressive. In each case, the proprietor chooses the content of his expression—how to plate the cake, what advice to give, where to seat patrons. In each case, engaging in the commercial transaction compelled by an antidiscrimination statute entails forced speech and association. Petitioners have not even attempted to explain how their wedding cakes are distinguishable from these examples and the myriad other such claims one can imagine. Recognizing petitioners' claim could therefore permit asserted expressive rights to eviscerate antidiscrimination laws.

2. The federal government, for its part, attempts to cabin its proposed compelled-speech exemption by arguing that the exemption should apply only when (i) the product or service is expressive, and (ii) the business owner provides it on commission (as opposed to

vored groups are able to participate as full members of American society.

B. Because Virtually Any Business Activity Can Be Recast As Expressive In Nature, Petitioners' Claimed Exemption Would Eviscerate Antidiscrimination Laws

1. Petitioners attempt to avoid the sweeping consequences of the First Amendment exemption they seek by asserting that their cakes are uniquely expressive. In petitioners' view, the expressive content of the cakes means that the act of designing and baking them expresses a message of support for the marriage in question. Pet. Br. at 24. But many, perhaps most, businesses could make similar claims. Consider the following:

- Recently, a restaurant in Washington, D.C., refused to provide a single dessert to a gay couple because two men sharing a dessert would not "go with the ambiance of the restaurant."[4] The restaurant clearly believed that allowing the couple to share dessert communicated that such conduct was acceptable. In serving the dessert on two plates, the restaurant sent an unmistakable message of disapprobation.
- A restaurant could claim that being compelled to admit African-American customers, take their orders, explain the menu, and convey prices entails compelled expression. Even permitting blacks and whites to commingle could be said to communicate that the customers are equal members of the community and that integration is appropriate.

---

[4] http://wapo.st/2ySarwy.

- Fertility clinics could contend that advising same-sex couples on their medical options for having children and providing appropriate treatment, entails compelled speech. Like petitioners' custom wedding cakes, clinic staff must tailor their advice to specific patients. They could claim that providing their services to same-sex or interracial couples conveys the message that it is appropriate for such couples to raise children.
- A clothing store that provides personal shoppers who give personalized advice may claim that it should not be compelled to serve customers shopping for outfits for a wedding of same-sex couples because doing so sends a message of endorsement.

As these examples show, no principled distinction can be drawn between petitioner's custom wedding cakes and a wide array of business activities that could be cast as expressive. In each case, the proprietor chooses the content of his expression—how to plate the cake, what advice to give, where to seat patrons. In each case, engaging in the commercial transaction compelled by an antidiscrimination statute entails forced speech and association. Petitioners have not even attempted to explain how their wedding cakes are distinguishable from these examples and the myriad other such claims one can imagine. Recognizing petitioners' claim could therefore permit asserted expressive rights to eviscerate antidiscrimination laws.

2. The federal government, for its part, attempts to cabin its proposed compelled-speech exemption by arguing that the exemption should apply only when (i) the product or service is expressive, and (ii) the business owner provides it on commission (as opposed to

providing it off the shelf). Brief of United States 19–22 ("U.S. Br.").

This is no limit at all. If wedding cakes are sufficiently expressive to come within the *Hurley/Dale* exception, so would any number of ordinary products and services, such as those described above. And virtually all services, and many goods, are "made to order," in the sense that they are undertaken in response to customer requests. Restaurant meals, for instance, are made to order, and both the dishes themselves and the act of serving particular patrons have expressive components. *See supra* pp. 26–27. In the government's view, then, restaurants apparently could claim a First Amendment right to refuse to serve particular patrons.

Nor is it clear why it is that, if perceived endorsement is the problem, petitioners' claimed exemption could be limited to products or services made to order or on commission. Surely the act of selling a pre-made wedding ring to a same-sex couple sends the same message of endorsement as making one to order. In all events, applying the government's made-to-order limitation would embroil courts in parsing degrees of expressiveness, not to mention purchase agreements and vendor contracts.

The government also asserts that a proprietor may claim an exemption on the ground that the mere use of its specially made product in a ceremony compels the proprietor to "figuratively" participate in it. U.S. Br. at 19. But the government does not explain why it is reasonable to assume that any witness to a wedding ceremony would conclude, based on the use of an inanimate product (such as a wedding dress) in the ceremony, that the product's creator endorses the ceremo-

ny. If a law school's hosting particular groups on campus, providing a room for them, and advertising their presence does not suggest that the law school endorses the hosted groups, *FAIR*, 547 U.S. at 65, it is difficult to see how providing a product that is used in a ceremony that one does not attend (and may not even know about) could be understood to convey endorsement.

3. The government also fails to grapple with the obvious implications of its argument. If the government's compelled-speech analysis is correct, there would be no evident justification for disallowing exemptions based upon claims of free exercise or freedom of association. These are all claims of constitutional stature, and this Court has never suggested that the freedom not to speak is entitled to greater solicitude than the right to the free exercise of religion or freedom of association.

The Court has long held that a claimed free-exercise right, without more, does not justify an exemption to generally applicable laws that incidentally burden the exercise of that right. *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990); *accord Bob Jones Univ.*, 461 U.S. at 604. Notwithstanding the fundamental importance of religious exercise, the Court in *Smith* reasoned that the First Amendment "has not been offended" by burdens that are "merely the incidental effect of a generally applicable and otherwise valid provision," 494 U.S. at 878, and laws of general application "could not function" if they were continually subject to challenge on religious grounds.[5] *Id.* at 880. Those premises are

---

[5] After *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, which "prohibits the Federal Government from taking any action that